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No. 85-28

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

REDCO CORPORATION,
Petitioner,

v.

CBS INC. and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

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PARTIES TO THE PROCEEDING

The parties to this proceeding are Redco Corporation, CBS Inc., and the Insurance Institute for Highway Safety.

Excluding its wholly-owned subsidiaries, the following companies are subsidiaries or affiliates of CBS Inc.: April Music Publishing Company (Proprietary) Limited; Entertainment Distributors Company Pty. Limited; Music Publishing Co. of Australia Pty. Limited; CBS Catalogue Partnership [Limited Partnership]; N.S. Beaujolais Music, Inc.; N.S. Justinian Music, Inc.; Golden Apple Music, Inc.; CBS Affiliated Catalog Inc.; CBS Feist Catalog Inc.; CBS Hastings Catalog Inc.; CBS Miller Catalog Inc.; CBS Robbins Catalog Inc.; CBS U Catalog Inc.; CBS Unart Catalog Inc.; CBS Variety Catalog Inc.; United Artists Music (Australia) Pty. Limited; United Partnership Limited; United Artists Music (France) S.A.; United Artists Musik GmbH; Phonix Musikverlag GmbH; United Artists Music (Nederland) B.V.; Edizioni Musicali United Artists (Italy) S.r.l.; Resolute Casa Editrice Musicali S.r.l.; United Artists Music Japan Inc.; United Artists Musikforlag AB; United Artists Music (South Africa) Pty. Limited; Grammofonselskabs Distributions Centralen A/S; CBS Epic (Thailand) Limited; CBS Music (Thailand) Limited; CBS/FOX Company, The [General Partnership]; CBS/FOX VIDEO (Holdings) Ltd.; CBS/FOX VIDEO Limited; CBS/FOX VIDEO (Germany) GmbH; CBS/FOX VIDEO (South Pacific) Pty. Ltd.; CBS/FOX VIDEO (Canada) Ltd.; CBS/FOX VIDEO (Espanola) S.A.; CBS/FOX VIDEO French Film Licensing Corp.; CBS/FOX VIDEO (France) S.A.; CBS/FOX VIDEO International S.A.R.L.; CBS/FOX VIDEO (New Zealand) Limited; CBS Gramophone Records and Tapes (India) Limited; CBS Disques S.A.; CBS Electronics Ltd.; Editions CBS Songs S.A.R.L.; CBS/MTM Company [General Partnership]; CBS Records Chile Ltda.; CBS Records (Kenya) Limited;

PEC Musiikkitukku OY; Music Service Center Gesellschaft m.b.H.; CBS/SONY Group Inc.; SD Kansai Inc.; CBS/SONY Inc.; CBS/SONY Family Club, Inc.; CBS/SONY Records Inc.; April Music, Inc.; CBS/SONY California, Inc.; Digital Audio Disc Corporation; EPIC/SONY, Inc.; CBS/SONY Hong Kong Limited; CBS/Sony Publishing Inc.; Japan Record Distribution System, Inc.; Music Plaza, Inc.; SD Hokkaido Inc.; Shorewood Packaging Company Limited; CBS Songs Music Publishing Co. Ltd.; Editora Melograf Ltda.; Melograf S.A.; Fender Japan, Ltd.; Gramophone Record Company (Proprietary) Limited; Ideal Toy Company of Canada, Ltd.; Igaku-Shoin/Saunders Ltd.; Shorewood Packaging Corp. of Canada Limited; Trintex [General Partnership]; and Tri-Star Pictures [General Partnership].

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Respondents CBS Inc. and the Insurance Institute for Highway Safety respectfully submit that Redco Corporation's petition for a writ of certiorari should be denied. The decisions of the courts below correctly applied the law of Pennsylvania to this case, and Redco has raised no question of federal law that merits review of those decisions by this Court.

CITATIONS TO THE OPINIONS BELOW

The opinion of the district court directing entry of summary judgment in favor of respondent CBS Inc. (A. 117-52)* is reported at 10 Media L. Rep. (B.N.A.) 1536 (M.D. Pa. 1984). The opinion of the district court directing entry of summary judgment in favor of respondent Insurance Institute for Highway Safety (A. 155-58) is not reported. The opinion of the court of appeals (A. 163-67) is reported at 758 F.2d 970, 11 Media L. Rep. (B.N.A.) 1861 (3d Cir. 1985).

STATEMENT OF JURISDICTION

The judgment of the court of appeals (S.A. 8-9) was entered on April 9, 1985. A petition for rehearing was denied on May 7, 1985 (S.A. 10), and a certified copy of the judgment was issued in lieu of a formal mandate on May 15, 1985 (S.A. 9). The petition for certiorari was docketed on July 5, 1985. Jurisdiction is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions cited by petitioner, the state law questions petitioner seeks to present to this Court also involve application of the Pennsylvania Bill of Rights, Pa. Const. Art. I § 7, and the Pennsylvania Shield Law, 42 Pa. C.S. § 5942. The text of these provisions is set forth in the supplemental appendix at S.A. 23.

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* In a number of respects, the petition for certiorari fails to comply with the rules of this Court, and, for the convenience of the Court, respondents have sought to correct those errors in this document. The errors include failure to place in the appendix some of the items required by Rule 21.1(k), and respondents therefore are attaching to this brief a supplemental appendix containing those items. References in this brief to petitioner's appendix are preceded by "A," and references to respondents' supplemental appendix are preceded by "S.A." Respondents submit that petitioner's failure to comply with the rules of this Court provides an additional reason why the petition should be denied. *Cf.* S. Ct. R. 21.5.

STATEMENT OF THE CASE

Petitioner Redco Corporation brought this action to recover for product disparagement, defamation, interference with contractual relations, and civil conspiracy. A. 1-24. Each of those claims was based on state law, and federal jurisdiction was based on diversity of citizenship. 28 U.S.C. § 1332. The district court reviewed each of Redco's claims and applied Pennsylvania law to dispose of them. A. 127-52. The court of appeals affirmed without dissent and denied a petition for rehearing in banc. A.163-67; S.A. 10. Redco's petition for certiorari raises no question of federal law warranting review of those decisions by this Court.

Redco's claims are based on a 1981 broadcast on *60 Minutes*, a program produced and broadcast by respondent CBS Inc., of a report entitled "Killer Wheels." That report, a transcript of which is reproduced at A. 25-38, discussed the dangers of multi-piece rims used on the wheels of trucks and other large vehicles. The rims consist of interlocking pieces of metal that are held together by the air pressure in tires mounted on them. S.A. 11; *see generally* Occupational Safety and Health Administration Standard, Servicing Multi-Piece Rim Wheels, 45 Fed. Reg. 6706 (Jan. 29, 1980). If the rim pieces separate because of servicing errors, mismatching of parts, improper assembly, or other reasons, the air pressure can propel the pieces outward at great force. From 1970 to 1978, these explosive separations caused 368 injuries and 89 deaths. S.A. 13-15. The rim dangers gave rise to a series of legislative and administrative proceedings to restrict or regulate use of the rims, including consideration by the National Highway Traffic Safety Administration ("NHTSA") of whether the rims should be banned. S.A. 18-21.

The CBS program about the rims was aired in March 1981, while NHTSA's proposed ban was pending. The

program reported the accidents and deaths caused by the rims, noting three case examples. In discussing the potential for injury, the program showed part of an interview with Ben Kelley, an employee of respondent Insurance Institute for Highway Safety ("the Institute"), who discussed how the rims cause injury and stated that the actual number of injuries may be greater than the number reported. A. 28, 30-31. It also included part of an interview with the former administrator of NHTSA, who commented that recall of the rims is "the only ethical thing for the manufacturer to do." A. 38. The program never mentioned Redco, but it named four other manufacturers of the rims and reported the manufacturers' position that rim accidents are statistically rare. A. 30, 33. A former executive for one of the four other companies repeated that position in an interview. A. 34-38.

Redco sued on March 3, 1982. It contended that the CBS report and Kelley's statements during the report presented a distorted view of multi-piece rims that made them appear dangerous when, in Redco's view, they are not. A. 1-23. After a series of depositions and other discovery, CBS moved for summary judgment based largely on the defenses of truth and opinion. Redco responded that summary judgment was not appropriate because it needed to obtain through discovery materials that were protected from disclosure by the Pennsylvania Shield Law, 42 Pa. C.S. § 5942, and were relevant to the question of actual malice. The district court ruled that it would consider permitting further discovery by Redco, but only if Redco could show that the discovery would be relevant to the issues raised in the summary judgment motion, which did not include actual malice. S.A. 1-7. Redco then sought no discovery relevant to the motion.

Pursuant to a local rule of the district court, CBS filed a statement of the uncontested facts on which its motion was based and Redco filed a counterstatement that, as disclosed in a side-by-side comparison presented

to the district court (S.A. 11-22), reworded or elaborated on the CBS fact statements, but did not dispute them. After reviewing those statements, as well as affidavits, documents, and discovery materials, the district court determined that no fact material to the issues raised by the summary judgment motion was in dispute. A. 136, 142-43.

The court held that, although the program did not mention Redco, it might be considered "of and concerning" Redco under Pennsylvania law relating to libel of small groups. A. 128-32. Even assuming that that was the case, however, the court held that Redco could not recover for product disparagement or defamation because every statement in the program of which Redco complained either was true or, under Pennsylvania law, was a non-actionable opinion based on disclosed true facts. A. 137-42. The court stated that the program as a whole might have implied that multi-piece rims are dangerous and that their manufacturers are unethical, but it held that each such implication was an opinion for which there could be no liability and as to which the facts on which the opinion was based were undisputed and true. A. 143-49. Finally, the court held that Redco had not asserted viable claims for interference with business relations or conspiracy under Pennsylvania law. A. 149-52.

The Institute subsequently filed its own summary judgment motion based on the "law of the case." Redco responded with a series of affidavits, proposed findings, and other materials (A. 39-116). The district court held that, even if those materials were to be considered, summary judgment against Redco still should be granted on the basis of the court's prior opinion. A. 155-60.

The court of appeals affirmed, largely adopting the reasoning of the district court. A. 161-67. Redco filed a petition for rehearing, which the court of appeals denied. S.A. 10.

ARGUMENT

Summary of Reasons for Denying the Writ

There is no reason for this Court to review this case. Redco has identified no question of federal law for this Court's consideration. Instead, it has argued that this Court should review the lower courts' determinations of state law and undisputed facts, hardly an appropriate task for this Court.

Each of the specific questions posed in Redco's petition is without merit. There is no basis upon which this Court should declare that a broadcasting company such as CBS has no right to state its opinion on an important question of public safety, or that Pennsylvania may not, as a matter of state law, establish protection for such opinions in defamation cases. The lower courts' holdings concerning the truth of specific statements in the broadcast were based on an in-depth assessment of the factual record which does not call for further review here. The issue concerning which party has the burden of proving truth in Pennsylvania is of no relevance here because the lower courts found that there were no disputed factual issues with respect to the truth of any of the statements. Finally, there is no reason for this Court to review the district court's discovery orders because they did no more than restrict discovery to the issues raised on the summary judgment motions and to fit discovery within the requirements of Pennsylvania law.

I. THIS CASE PRESENTS NO FEDERAL QUESTION OR OTHER IMPORTANT CONSIDERATIONS WARRANTING REVIEW BY THIS COURT.

Redco's petition has neither raised an undecided federal question nor identified any conflict within the lower courts or with an opinion of this Court. Rather, in a contrived effort to fit the petition within Rule 17.1(a) of the Rules of this Court, Redco implies (at p. 11) that this is a case in which the Court of Appeals for the Third Circuit "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." But no such departure has taken place. Redco merely is complaining that the lower courts' application of Pennsylvania substantive law has precluded its recovery against the respondents. Thus, Redco concludes (p. 30), "Either the Lower Courts are in error or the law should be changed." The lower courts correctly applied the current law of Pennsylvania, and it is fatuous to ask this Court to grant relief by changing state law.

Despite the multiple torts that Redco alleges, in essence this is a libel case. As this Court discussed at length last Term in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. _____, 53 U.S.L.W. 4866 (1985), while such cases frequently present important questions under the First Amendment, significant areas of libel remain committed to state law. This case turned on those state law questions, and it therefore does not present an appropriate occasion for this Court to examine the extent of the First Amendment's protection for defamation.

The lower courts' decisions turned on three major issues. The first was what "defamatory meaning" could be applied to the broadcast. The district court decided that question solely on the basis of Pennsylvania law. A.

132-33, *citing Corabi v. Curtis Publishing Co.*, 441 Pa. 432, 273 A.2d 899 (1971); *Cosgrove Studio & Camera Shop, Inc. v. Pane*, 408 Pa. 314, 182 A.2d 751 (1962); *Boyer v. Pitt Publishing Co.*, 324 Pa. 154, 188 A. 203 (1936); *Dunlap v. Philadelphia Newspapers, Inc.*, 301 Pa. Super. 475, 448 A.2d 6 (1982), *leave to appeal denied* (Pa. 1982); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264 (3d Cir. 1980) (applying Pennsylvania law); *Pierce v. Capital Cities Communications, Inc.* 576 F.2d 495 (3d Cir.) (applying Pennsylvania law), *cert. denied*, 439 U.S. 861 (1978); *Fram v. Yellow Cab Co.*, 380 F. Supp. 1314 (W.D. Pa. 1974) (applying Pennsylvania law). The court of appeals did the same. A. 164, *citing Corabi, supra; Cosgrove, supra*. That issue presents no federal question.

Second, the district court held that the statements of fact set forth in the broadcast, including those about deaths and injuries caused by multi-piece rims, were true, applying the "substantial truth" standard established in Pennsylvania. A. 133, *citing Corabi, supra; Kilian v. Doubleday & Co.*, 367 Pa. 117, 79 A.2d 657 (1951); *Dunlap, supra*. In affirming, the court of appeals relied on the opinion of the district court. A. 164-65. Again, the decision was based on Pennsylvania state law.

Redco argues that this Court should grant a writ of certiorari because the lower courts misapplied Pennsylvania law in allocating the burden of proof on the truth question. That state law argument was presented to the court of appeals in Redco's petition for rehearing, and the court of appeals denied the petition. Whether the law of Pennsylvania would require application to these facts of the burden allocation Redco advocates should not be a matter for this Court's review, for this Court does not normally sit in judgment of the correctness of state law determinations by lower federal courts. See, e.g., *Bishop*

v. Wood, 426 U.S. 341, 345-47 & n.10 (1976). As discussed below, because of its procedural posture, the burden of proof had no application to this case in any event. Therefore, although the constitutionality of Pennsylvania's burden allocation now is before this Court for consideration, *Philadelphia Newspapers, Inc. v. Hepps*, No. 84-1491, that issue is not relevant to this appeal.

The final major substantive holding by the lower courts was that some of the statements made or implied in the broadcast were opinions absolutely protected from liability. Again, this holding was based on the law of Pennsylvania. A. 134-35, *citing Bogash v. Elkins*, 405 Pa. 437, 176 A.2d 677 (1962); *Braig v. Field Communications*, 310 Pa. Super. 569, 456 A.2d 1366 (1983), *cert. denied*, 466 U.S. _____, 104 S. Ct. 2341 (1984); *Beckman v. Dunn*, 276 Pa. Super. 527, 419 A.2d 583 (1980). The court of appeals affirmed largely on the basis of the Restatement (Second) of Torts § 566 (1977). A. 166. Although the opinion defense has a strong basis in the First Amendment (*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974)), in Pennsylvania it also is based on the state's Bill of Rights, Pa. Const., Art. I, § 7, which declares the "free communication of thoughts and opinions [to be] one of the invaluable rights of man." *See Bogash, supra*. The Pennsylvania cases cited by the district court relied in part on that state constitutional protection, as well as court-made law developed from the Second Restatement of Torts. Thus, the opinion issue in this case turns largely on state, rather than federal, law.

The contours of the opinion defense under the First Amendment recently have been the subject of debate in the lower federal courts, as well as in this Court. *See, e.g., Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc), *cert. denied*, 471 U.S. _____, 105 S.Ct. 2662 (1985). There is no need to explore those contours in this case, however, since the state law protection of opinions under the law of Pennsylvania would remain to defeat

any recovery by Redco. The opinion defense issue therefore is not appropriate for review.

Apart from the substantive questions, Redco also complains about the lower courts' determinations that there were no material factual disputes with respect to the truth of factual statements in the broadcast and the district court's limitation of discovery to material relevant to issues presented by the summary judgment motions. Neither matter warrants review. This Court does not grant certiorari "merely to review the evidence or inferences drawn from it." *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). The district court's exercise of discretion on the discovery questions was argued to the court of appeals, which found no error. There is no reason for this Court to be concerned with these issues.

In sum, Redco has raised no question in its petition that merits review by this Court. The petition should be denied.

II. NONE OF THE REASONS STATED BY REDCO PRESENTS A SUFFICIENT LIKELIHOOD OF REVERSAL TO MERIT REVIEW BY THIS COURT.

A. There Is No Legal Reason To Deny a Broadcaster the Right To State Its Opinion on an Important Matter of Public Safety.

Redco's first argument is that the lower courts erred in holding that opinions stated in the CBS broadcast were protected from liability because broadcasters such as CBS should not have a right to state their opinions. It is no surprise that Redco lacks authority to support its position. Obviously, apart from its inconsistency with Pennsylvania law, Redco's argument is a frontal assault on the First Amendment and the "profound national commitment" to the free exchange of opinions and ideas

that is at its heart. *See New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

Redco's argument is particularly unappealing in this case, since it would restrict the free exchange of ideas on a question of product safety that has been subject to scrutiny in federal and state administrative and legislative proceedings. The *60 Minutes* report involved a matter of vital concern to the public. Redco's argument that a broadcast organization such as CBS should have a lesser right to comment on such issues because it can reach a wider audience than other opinionmakers is completely untenable. "[I]n the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities." *Dun & Bradstreet, supra*, 53 U.S.L.W. at 4875 (opinion of Brennan, J.); *see id.* at 4872 (opinion of White, J.).

There was nothing novel about the lower courts' approach to the opinion issues in this case. Although, as noted, application of the opinion defense in some factual situations has provoked judicial debate (*see, e.g. Ollman, supra*), the statements to which the opinion defense was applied in this case —*e.g.*, implied assertions that multipiece rims are dangerous or that their manufacturers are "unethical" — fell clearly within the type of generalized, subjective judgments that are incapable of proof and that uniformly have been accorded opinion status by the courts. *See generally Lauderback v. American Broadcasting Cos.*, 741 F.2d 193 (8th Cir. 1984), *cert. denied*, 469 U.S. _____, 105 S. Ct. 961 (1985); *National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc.*, 705 F.2d 98 (4th Cir.), *cert. denied*, 464 U.S. 830 (1983); *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y. 2d 369, 397 N.Y. Supp. 2d 943, 366 N.E.2d 1299, *cert. denied*, 434 U.S. 969 (1977); *Beckman v. Dunn*, 276 Pa.

Super. 527, 419 A.2d 583 (1980). Redco wishes to change this uniform law so that opinions may be declared false. A society that tolerates only "correct" opinions will have lost a critical measure of its freedom.

In any event, the real question here is not whether the federal Constitution compels the protection of opinions afforded by the lower courts in this case, but, since that protection was based largely (if not entirely) on state law, whether the Constitution prohibits Pennsylvania from affording such protection. Redco's petition (at pp. 15-16) argues that the protection of opinions somehow deprives it of property rights under the Fifth Amendment. Redco cites no authority in support of that argument, and respondents are aware of none. The argument is unreasoned and little more than frivolous.

B. The Lower Court Correctly Determined That There Was No Material Issue of Fact Relating to the Truth of Any Relevant Factual Statement in the Broadcast.

The district court held that, even though Redco was not named in the broadcast, it might have been considered the subject of the broadcast because it is one of a small group of multi-piece rim manufacturers. A. 128-32. Relying on that holding, Redco repeatedly has argued that every statement made in the broadcast, such as the statement that some multi-piece rims have caused deaths, must be read as though it referred directly to Redco itself. Redco then has sought to amass evidence that those specific statements might not be true insofar as they applied to Redco. In particular, it has argued that there is no evidence that anyone has died as a result of explosive separation of a Redco rim, although it does not dispute that persons have been injured by Redco rim parts (S.A. 13) and that scores of persons have died as a result of separations of rims made by other members of the small group of which Redco claims to be a part (S.A. 13-15). In concluding this jerry-built argument, Redco

asserts that, because it has presented evidence disputing application of these specific statements in the program to Redco, summary judgment with respect to the truth of these statements should have been denied.

As previously noted, the question of which material facts in the record were and were not disputed is not an appropriate question for review by this Court. In the first place, Redco's characterization of the record before the district court is highly misleading. Many of the affidavits and other materials included in Redco's appendix, A. 46-116, were not presented to the district court until *after* that court had entered summary judgment in favor of CBS. They were before the court with respect to the Institute's summary judgment motion, but, at that point, the proffered evidence was so inherently unreliable that it could be ignored. *See, e.g. Dudo v. Schaffer*, 91 F.R.D. 128, 132-33 (E.D. Pa. 1981).

More significantly, however, none of the statements that Redco seeks to have interpreted as applying to it was reasonably subject to the interpretation Redco seeks, so that whatever material was in the record on those issues could not change the result. The district court considered Redco's proposed misinterpretations of the broadcast, and it labeled them "excessive." A. 158 n.1. The court of appeals found Redco's suggested construction of the broadcast "unreasonable." A. 165. The lower courts based these conclusions on Pennsylvania law, which prescribes rules for assessing the reasonable meaning of an allegedly defamatory publication. Their determinations were entirely correct, and they do not require further review here.

Apart from Redco's misinterpreted statements, the district court carefully reviewed the record, including the cross-statements of uncontested facts, and found that, with respect to the *material* factual issues (such as injuries and deaths from multi-piece rims in general, and

proposals that the rims be banned) there was no genuine dispute. After reviewing the record, the court of appeals affirmed. There is no reason for this Court to conduct another review of the facts.

C. This Court Should Not Grant Certiorari To Determine the Appropriate Allocation of the Burden of Proving Truth Under Pennsylvania Law.

Redco's third argument in its petition is based entirely on state law. Redco points out that, after the district court entered judgment for respondents, the Supreme Court of Pennsylvania held that the burden of proving truth in a defamation case brought by a plaintiff that is not a public official or a public figure must be placed on the defendant. *Hepps v. Philadelphia Newspapers, Inc.*, _____Pa. _____, 485 A.2d 374 (1984), *prob. jur. noted*, 472 U.S. _____, 53 U.S.L.W. 3894 (1985) (No. 84-1491). Redco argues that the new decision made a "dramatic change in the law" (p. 25) that justified reversal and a remand to the district court. The *Hepps* decision was called to the attention of the court of appeals during briefing in that court, and Redco made its state law argument based on *Hepps* in its petition for a rehearing. The court of appeals rejected the argument. Apart from the fact that the question is entirely one of Pennsylvania law, there are a number of reasons why this issue does not merit review here.

First, although the district court's opinion did discuss the burden of proving truth under Pennsylvania law, A. 133-34, the court made clear that it did not rely on allocation of the burden in deciding the case. Instead, because it was faced with a motion for summary judgment, the district court correctly stated that it could render judgment "only if no genuine issue as to any material fact exists," and that, in making that determination, it had to "view the evidence in a light most favorable to the non-moving party." A. 136 n.6. The remainder of the

opinion made clear that the court was not weighing evidence, but was looking for material factual disputes and finding that none existed.

Second, as evident from Redco's own petition (p. 26), the burden allocation would have affected the result only if statements in the broadcast were interpreted to have the "excessive" and "unreasonable" meanings rejected by each of the lower courts, for Redco's twisted interpretations are the only ones that could give rise to any dispute about truth. Thus, Redco is arguing for reversal and a remand so that the lower courts can consider who has the burden of proving the truth of statements about Redco that could not reasonably be deduced from the program. Clearly, that would be a useless act.

Third, Redco overstates the breadth and significance of the *Hepps* decision. Rather than declaring a "dramatic change in the law," that decision merely upheld a longstanding provision of Pennsylvania law that has been codified by statute, 42 Pa. C.S. § 8343(b)(1). The novelty of the decision was its inconsistency with recent First Amendment jurisprudence, but the statute upon which the decision was based was available for invocation by Redco at the time it filed suit, if Redco wished to rely upon it.

Moreover, it is highly doubtful that the *Hepps* decision applies to this case at all. It relates only to claims for defamation, and only to such claims by private-figure plaintiffs. Thus, the product disparagement claim asserted by Redco would continue to be subject to the Pennsylvania rule that the plaintiff is required to prove falsity. *See, e.g., Young v. Geiske*, 209 Pa. 515, 58 A. 887 (1904). And, since Redco probably will be held to be a public figure (a determination that has not yet been made), the *Hepps* decision in all likelihood will have no application to Redco's defamation claims either.

In summary, there is no reason for this Court to accept review of this case so that it can try to correct an asserted error of Pennsylvania law that had no effect on the result and has a highly questionable application to this case.

D. The Discovery Issues Involved Were Clearly Within the District Court's Discretion.

Finally, Redco complains that it did not have an adequate opportunity to conduct discovery in this case. Again, Redco's recitation of the events relating to discovery and the state of the record are misleading. The district court gave Redco ample opportunity to present any factual information and conduct any discovery that was necessary to deal with the issues raised on the motions for summary judgment. S.A. 4, 6. Redco failed to avail itself of that opportunity.

The district court's regulation of discovery was an entirely correct exercise of its discretion. The material that Redco sought to discover related largely to questions such as actual malice. It consisted of materials relating to CBS' editorial processes, including reporters' notes and memoranda and tapes of unbroadcast material. In Pennsylvania, such materials are statutorily privileged from disclosure. Pennsylvania Shield Law, 42 Pa. C.S. § 5942. *See generally In re Taylor*, 412 Pa. 32, 40, 193 A.2d 181, 185 (1963); *Lal v. CBS, Inc.*, 726 F.2d 97, 100 (3d Cir. 1984); *Steaks Unlimited, Inc. v. Deaner*, 623 F.2d 264, 277-79 (3d Cir. 1980). Redco thus was not entitled to the requested discovery under Pennsylvania state law.

Apart from the statute, the district court had sound reasons for limiting the discovery to evidence relevant to the summary judgment motion. Discovery permitted without that restriction would have been wasteful and expensive and would have required determination of constitutional arguments raised by Redco to avoid the

Pennsylvania Shield Law privilege. S.A. 2-4. The district court's discovery rulings were a sound approach to the delicate constitutional questions that arise in defamation cases. *See McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 717 F.2d 1460, 1466-67 (D.C. Cir. 1983). Nothing about them requires review by this Court.

CONCLUSION

Redco's petition for certiorari presents no issue that merits the time or attention of the Supreme Court of the United States. Redco's petition should be denied.

Respectfully submitted,

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Supplemental Appendix.

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DISTRICT COURT MEMORANDUM AND ORDER OF APRIL 25, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REDCO CORPORATION,	:	
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION
	:	NO. 82-0263
CBS, INC., and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,	:	
	:	
Defendants	:	

MEMORANDUM

I. PROCEDURAL HISTORY

On March 3, 1981, Defendant CBS, Inc., through its news division, CBS News, broadcast a program known as *60 Minutes*. One segment of the show was entitled "Killer Wheels", which concerned the use of multi-piece tire rims on the wheels of large motor vehicles. The segment addressed the issue of whether certain multi-piece rims presented a safety hazard. CBS broadcast this segment again on September 6, 1981.

On March 3, 1982, Redco Corporation [hereinafter Redco], a Pennsylvania corporation that manufactures particular types of multipiece rims, filed suit against CBS and The Insurance Institute for Highway Safety [hereinafter Institute]. The complaint averred four causes of action: trade libel-disparagement, defamation, intentional interference with existing and prospective business relations, and conspiracy. Timely answers were filed by CBS on April 19, 1982, and by the Institute on

April 27, 1982. Thereafter, discovery proceeded between the parties.

On December 10, 1982, Redco moved for an order to compel certain discovery. Redco sought a number of documents from CBS, including transcripts or tapes of interviews conducted in preparation of "Killer Wheels" but not actually broadcast, identification of composite editing and of "reaction shots" and "reverse shots" made out of the natural time sequence, producers' "blue sheets", and correspondence concerning the broadcast. Redco additionally sought to compel CBS to answer a number of interrogatories. CBS opposed Redco's motion, alleging that the materials and information were protected from disclosure by the Pennsylvania Shield Law,[1] the New York Shield Law, the First Amendment of the United States Constitution, and the Pennsylvania Constitution.

On the same date that it filed its brief opposing Redco's motion to compel, December 27, 1982, CBS moved for summary judgment against Redco. CBS raised four grounds in support of summary judgment. Pursuant to Local Rule 401.4, CBS also submitted a statement of material facts as to which it contended no genuine issues existed to be tried.

Redco did not file a response to CBS' motion for summary judgment but, rather, it moved for a continuance of the motion on January 17, 1983. Redco averred that it needed to complete various areas of discovery before it could present facts necessary to oppose CBS' motion. We granted Redco's motion for a continuance on January 18, 1983, before CBS could submit an opposing brief to the motion. Thereafter, on January 27, 1983, CBS moved this court to reconsider our order granting Redco a continuance. The issue has been fully briefed and is ripe for consideration.

---

1. 42 Pa. C.S.A. §5942 (Purdons 1982).

II. CBS' MOTION FOR RECONSIDERATION

CBS desires us to revoke our January 18, 1983, order that granted Redco a continuance to oppose CBS' motion for summary judgment. In its motion and brief, CBS raises a number of reasons why we should reconsider that motion. First, CBS argues that it never had an opportunity to respond to Redco's motion for a continuance. Additionally, CBS maintains that should it prevail on any of its four grounds for summary judgment, no further discovery will be necessary. Such a result would save further expenditures of time and money. Moreover, the court would be able to avoid addressing constitutional questions concerning alleged free press issues.

CBS also asserts that the discovery completed to date is sufficient to defend the summary judgment motion. The discovery Redco seeks to obtain, CBS claims, is not relevant to the legal issues CBS raises in its summary judgment motion. Even should the court determine that Redco is entitled to further discovery, CBS argues that such discovery should be limited to that necessary for resolution of the summary judgment motion.

We find CBS' arguments and reasoning persuasive. While we cannot absolutely conclude that Redco is not entitled to further discovery, we believe Redco should be required to establish how any discovery it seeks relates to an issue raised in the summary judgment motion. There is no reason to unnecessarily extend discovery if it is possible that various legal arguments, or existing facts not in dispute, will resolve all, or part, of Redco's action. As Redco's January 17, 1983, motion for an extension of time to complete discovery reveals, the discovery Redco proposes is extensive. The parties surely will expend a great deal of time and money in completing such discovery, which will further delay any resolution of this case.

In addition, we agree with CBS that there is no need to address the constitutional issues raised by both parties if the action can be decided by other means. Courts should avoid inquiry into constitutional questions whenever possible unless such adjudication is unavoidable. HARRIS v. McRAE, 448 U.S. 297, 307 (1980), *citing*, SPECTOR MOTOR SERVICE, INC. v. McLAUGHLIN, 323 U.S. 101, 105 (1944). Nevertheless, we will not ignore constitutional issues to the prejudice of Redco. Rather, if Redco can persuade us that further discovery is necessary to fully defend the summary judgment motion, which discovery CBS opposes on constitutional and statutory grounds, we certainly will resolve the issues.

Therefore, we will revoke our order granting Redco a continuance to oppose CBS' motion for summary judgment and we will direct Reco to respond to CBS' motion and brief. Redco is also directed to respond to CBS' alleged undisputed facts as presented in CBS' statement and addendum under Local Rule 401.4. If Redco believes further discovery is necessary to dispute those facts, Redco shall explain what disputes exist and what discovery is necessary to resolve the issue.

Our order is not to be misconstrued as limiting Redco to disputing (if indeed Redco does) the factual averments listed in CBS' Local Rule 401.4 statement and addendum. To the contrary, Redco should clearly enumerate *all* factual questions it believes must be determined before the summary judgment motion as presented by CBS can be decided. Redco must state why the motion cannot be decided without clarification of these facts. Should we find further discovery to be necessary, a discovery conference may be held to attempt to resolve objections by the parties.

III. REDCO'S MOTION FOR A PROTECTIVE ORDER

As a final point, we note that on March 28, 1983, Redco moved for a protective order. No supporting brief has been filed to date. In a letter filed April 6, 1983, however, counsel for CBS responded that CBS did not oppose the motion, subject to clarification by Redco on one point.

While we do not believe the parties are in disagreement as to Redco's motion for a protective order, we cannot conclusively determine this as the record now stands. Since Redco has not filed a supporting brief pursuant to Local Rule 401.5, we will deem Redco's motion withdrawn without prejudice. If all parties agree to Redco's proposed motion, the protective order should be submitted as a stipulation. If the protective order is disputed, Redco may resubmit its motion.

An appropriate order will be entered.

/s/ R. DIXON HERMAN
R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE

Dated: April 25, 1983

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

REDCO CORPORATION,	:	
	:	
Plaintiff	:	
	:	
vs.	:	CIVIL ACTION
	:	NO. 82-0263
CBS, INC., and THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY,	:	
	:	
Defendants	:	

ORDER

AND NOW, this 25th day of April, 1983, in accordance with the memorandum released this date in the above-captioned action, IT IS HEREBY ORDERED that:

1. Defendant CBS' motion for reconsideration is granted.

2. The January 18, 1983, order of court granting Plaintiff Redco a continuance to oppose CBS' motion for summary judgment is terminated.

3. Redco is directed to respond to CBS' motion and brief for summary judgment, in addition to CBS' Local Rule 401.4 statement and addendum.

4. Redco is directed to enumerate any facts which are material to CBS' summary judgment motion that it alleges are in dispute or need to be identified. Redco is further directed to explain why it believes such facts are material.

5. Redco is granted twenty (20) days from the date of this order to comply with paragraphs three and four of this order.

6. Defendant CBS is granted fifteen (15) days from service of Redco's response to answer.

7. Redco is granted ten (10) days from service of CBS' answer to file a reply, if it so desires.

8. Redco's motion for a protective order is deemed withdrawn without prejudice to Redco's right to resubmit such motion.

/s/ R. DIXON HERMAN

R. DIXON HERMAN
UNITED STATES DISTRICT JUDGE

COURT OF APPEALS JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5525

REDCO CORPORATION, *Appellant*

vs.

CBS, INC. and
THE INSURANCE INSTITUTE FOR HIGHWAY SAFETY

(D. C. Civil No. 82-0263)

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

Present: ALDISERT, *Chief Judge,* SLOVITER, *Circuit Judge* and STAPLETON, *District Judge**

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit Rule 12(6) March 28, 1985.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 16, 1984, be, and the same is hereby affirmed. Costs taxed against the appellant.

ATTEST:

/s/ SALLY MRVOS
Clerk

April 9, 1985

1. * Honorable Walter K. Stapleton, Chief Judge of the United States District Court for the District of Delaware, sitting by designation.

Costs taxed in favor of Appellee, Insurance Institute for Highway Safety as follows:
Brief $112.80

Costs taxed in favor of Appellee, CBS, Inc. as follows:
Brief $152.00

Certified as a true copy and issued in lieu of a formal mandate on May 15, 1985.

Test: /s/ M. ELIZABETH FERGUSON

Chief Deputy Clerk, United States Court of Appeals for the Third Circuit.

COURT OF APPEALS ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 84-5525

REDCO CORPORATION,

Appellant

v.

CBS, INC. *et al.*

SUR PETITION FOR REHEARING

Present: ALDISERT, *Chief Judge*, SEITZ, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER *Circuit Judges*, and STAPLETON, *District Judge**

The petition for rehearing filed by Appellant, Redco Corporation, in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ DELORES K. SLOVITER
Circuit Judge

Dated: May 7, 1985

---

* Hon. Walter K. Stapleton, Chief Judge, United States District Court for the District of Delaware, sitting by designation.

SIDE-BY-SIDE COMPARISON OF STATEMENTS OF UNCONTESTED FACTS PRESENTED TO DISTRICT COURT IN CONNECTION WITH MOTIONS FOR SUMMARY JUDGMENT PURSUANT TO DISTRICT COURT LOCAL RULE 401.4

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1. Defendant's Statement A multi-piece rim consists of a rim base that supports a tubeless tire and one or more side or locking rings that hold the inflated tire onto the rim base by acting as a flange that confines the tire bead.	**1. Plaintiff's Counterstatement** A multi-piece rim consists of a rim base that supports a tube-type tire, inner tube, and flap, and on one or more sides are locking rings that hold the tire tube and flap on to the rim base by acting as a second flange that confines the tire bead during and after inflation. Multi-piece rims were generally limited in their application for use on trucks.
2. Defendant's Statement There are more than 25 different types or designs of multi-piece rims.	**2. Plaintiff's Counterstatement** While there are additional multi-piece rim designs, just about all of the rims in service in the United States are limited to nine (9) basic types or designs.
3. Defendant's Statement K-, KB-, KW-, and KWX- type rims were made by Goodyear Tire & Rubber Company.	**3. Plaintiff's Counterstatement** Admitted.
4. Defendant's Statement Redco Corporation ("Redco") has not made K-, KB-, KW-, or KWX- type rims.	**4. Plaintiff's Counterstatement** Admitted.
5. Defendant's Statement RH 5° rims were made by Firestone Tire & Rubber Co., Kelsey-Hayes Co., and Budd Company.	**5. Plaintiff's Counterstatement** Admitted.

6. Defendant's Statement
Redco has not made RH 5° type rims.

6. Plaintiff's Counterstatement
Admitted.

7. Defendant's Statement
Redco has not made any of the same types or designs of multi-piece rims as have been made by Goodyear Tire and Rubber Co., Firestone Tire & Rubber Co., Kelsey-Hayes Co., or Budd Company.

7. Plaintiff's Counterstatement
Redco Corporation, Firestone Tire and Rubber Company, Kelsey-Hayes Company, Budd Company and Goodyear Tire and Rubber Company have all manufactured multi-piece rims as defined in statement 1 and as defined in the "60 Minutes" segment "Killer Wheels" broadcast by the defendant on March 8, 1981 and September 6, 1981. It is noted that when CBS, Inc. portrayed the film produced by the Insurance Institute for Highway Safety, the test rims used in that film were of the two piece design, similar to those manufactured by Redco Corporation. The other manufacturers of multi-piece rims referred to in the "Killer Wheels" program all manufacture a two piece, multi-piece rim whose designs, though not exactly as that of Redco's, are similar in sizes, have the same intended usage and are maintained in similar ways.

8. Defendant's Statement
Multi-piece rims are used on trucks and other large motor vehicles.

8. Plaintiff's Counterstatement
Multi-piece rims are primarily used on trucks and other large motor vehicles, including buses and off the road equipment.

9. Defendant's Statement
There are millions of multi-piece rims in use on the highways.

9. Plaintiff's Counterstatement
There are between 50,000,000 and 100,000,000 multi-piece rims in use on the highways.

10. Defendant's Statement
Incidents have occurred in which multi-piece rims have separated while a tire was inflated, propelling rim pieces outward at great force.

10. Plaintiff's Counterstatement
A properly assembled multi-piece rim will not separate while a tire is being inflated or is being contained in an inflated manner. Explosive separation of multi-piece rims have occurred when parts have been mismatched, when damaged or worn parts have been used, when parts have been improperly assembled and where other misuse has occurred, including the failure to follow recognized safety handling procedures.

11. Defendant's Statement
Rim pieces propelled outward during such separations have struck persons in the head or other parts of their bodies.

11. Plaintiff's Counterstatement
It is admitted that persons have been injured or killed by the explosive separation of multi-piece rims. However, if proper safety procedures had been followed, the injuries would not have occurred. In addition, on and before March 8, 1981, Defendant had no evidence that a properly assembled Redco rim consisting of all Redco components had killed anyone.

12. Defendant's Statement
Hundreds of injuries have resulted from multi-piece rim separations.

12. Plaintiff's Counterstatement
During the period 1970 to 1978, 368 injuries resulted from 549 documented multi-piece rim separations. See Phase III report, p. 9, Plaintiff's Appendix "A".

13. Defendant's Statement
The impact of rim pieces propelled outward during rim separations has caused some persons to die.

13. Plaintiff's Counterstatement
During the period 1970 to 1978, 89 fatalities resulted from 549 documented multi-piece rim separations. See Phase III report, p. 9, Plaintiff's Appendix "A".

14. Defendant's Statement
More than 50 deaths have resulted from multi-piece rim separations.

14. Plaintiff's Counterstatement
Admitted.

15. Defendant's Statement
The fact that injuries and deaths have resulted from multi-piece rim separations was disclosed during the *60 Minutes* broadcasts at issue.

15. Plaintiff's Counterstatement
The "60 Minutes" segment "Killer Wheels" reported that more than 100 deaths and at least 400 injuries involving multi-piece rim explosions have occured. However, this representation was made in the context that single piece rims are a safe alternative. This is false. CBS, Inc. knew on and before March 8, 1981 that single piece wheel components present the same risk of harm as multi-piece wheel components.

16. Defendant's Statement
The *60 Minutes* broadcasts truthfully reported that "Spud" James was hit in the head with a piece of a rim that separated explosively while air was being put in a truck tire and that he lost his speech and is partially paralyzed as a result.

16. Plaintiff's Counterstatement
The "60 Minutes" segment "Killer Wheels" contained a report that Spud James was injured during a multi-piece rim separation. The Defendant, despite knowledge of the same, did not report that Spud James and his companions had misassembled the wheel prior to its separation and had not followed simple safety procedures. See Deposition of Dr. McCarthy, p. 78.

17. Defendant's Statement
The *60 Minutes* broadcasts truthfully reported that Eric Ehmann was killed when hit in the head by a piece of a rim that separated explosively after he had removed an inflated truck tire from a safety cage.

17. Plaintiff's Counterstatement
The "60 Minutes" segment "Killer Wheels" reported that Eric Ehmann was killed during a multi-piece rim separation. The program, though possessing the information, however, failed to disclose that Mr.

Ehmann had not been properly trained to service multi-piece rims and that this fact was extremely important to Mrs. Ehmann who had urged NHTSA to require proper training in tire-wheel assembly. See Deposition of Dr. McCarthy only.

18. Defendant's Statement
The *60 Minutes* broadcasts truthfully reported that Clifford Griggs was hit in the face with a piece of a rim that separated explosively because the parts were mismatched, causing him to suffer from traumatic epilepsy.

18. Plaintiff's Counterstatement
Admitted.

19. Defendant's Statement
In 1979, the National Highway Traffic Safety Administration (NHTSA) reported 439 explosive separations of multi-piece rims, 71 of which resulted in one or more deaths and 234 of which resulted in serious injuries.

19. Plaintiff's Counterstatement
While the National Highway Traffic and Safety Administration may have reported the explosive separation alleged, in fact, the actual number of explosions and deaths are set forth in paragraph 12 and 13.

20. Defendant's Statement
In 1980, the Occupational Safety and Health Administration (OSHA) reported that approximately 65% of all rim accidents result in injury and approximately 15% are fatal.

20. Plaintiff's Counterstatement
In 1980, OSHA reported that approximately 63% of all rim accidents resulted in injury and approximately 13% are fatal, 24% resulted in no injury, 45 F.R. 6707 (1-29-80). These statistics reflect accident rates prior to the promulgation of OSHA safety statistics.

21. Defendant's Statement
In 1982, NHTSA reported that it had verified 549 explosive separations of multi-piece rims between 1954 and 1978, resulting in 368 injuries and 89 deaths.

21. Plaintiff's Counterstatement
Admitted. Except, the National Highway Traffic and Safety Administration also noted that the new OSHA standard would reduce the number of multi-piece rim separation incidents.

22. Defendant's Statement
Among the persons who have been killed or injured by explosive separations of multi-piece rims are persons who were not involved in servicing the rims or tires.

22. Plaintiff's Counterstatement
CBS has made it appear that large numbers of people not involved in servicing the rim were killed or injured. In fact, CBS knew injuries from multi-piece rims were more rare than deaths from random lightning strikes. (Ten times as many persons are killed by lightning.) Deaths or injuries of by-standers is known to be incredibly rare.

23. Defendant's Statement
Some rim separations have occurred after rim and tire servicing was completed.

23. Plaintiff's Counterstatement
Admitted. Except, 75% to 80% of all multi-piece rim separations occur during servicing. 47 F.R. 8232 (2-25-82).

24. Defendant's Statement
NHTSA defect investigations disclosed 27 deaths from reported Pinto gas tank accidents.

24. Plaintiff's Counterstatement
The Plaintiff has been unable to verify the allegation in 24. However, if 27 deaths were reported as a result of the Pinto gas tank explosion, the Pinto was not manufactured in the volume and used for the time that multi-piece rims were manufactured and used. Statistically, the death rate in Pinto gas tank explosions will show a substantially higher rate of death than found with multi-piece rims. The comparison in the context presented: (a) that the rims are more dangerous than those on cars and kill more people than the Pinto is a false statement.

25. Defendant's Statement
A NHTSA defect investigation disclosed 41 deaths from reported accidents involving the Firestone 500 Tire.

25. Plaintiff's Counterstatement
While a NHTSA defect investigation may have disclosed 41 deaths from reported accidents involving the Firestone 500, the

deaths would be attributed to 10,000,000 tires. From the risk analysis made by Analysis Associate and designated the Phase III report, CBS knew that at least 58,700,000 multi-piece rims were in service in 1978. This figure is 5.87 times more that the 10,500,000 tires manufactured. Therefore, there were 2.7 times more than the 89 deaths reported in multi-piece rim accidents, suggesting that the statement that the rims are more dangerous than the Firestone tire is false.

26. Defendant's Statement
In 1969, Paul Hykes, a former Budd Company engineer, suggested that RH 5° rims be removed from the market.

26. Plaintiff's Counterstatement
In 1969, Paul Hykes, a former Budd Company engineer, did suggest that RH 5° rims be removed from the market. However, the representative of CBS, Inc. contacted Mr. Hykes prior to the publication of the March 8, and September 6, 1981 programs. This representative was informed by Mr. Hykes that he had recanted his view, that he was "wrong" in 1969, and that when he became fully informed of the safety record of the RH 5° rim, he changed his mind. These facts were not used by CBS, Inc. when broadcasting their program.

27. Defendant's Statement
In 1969, the National Tire Dealers and Retreaders Association passed a resolution recommending elimination of multi-piece rims as hazardous.

27. Plaintiff's Counterstatement
While in 1969 there was a resolution passed by the National Tire Dealers and Retreaders Association recommending the elimination of multi-piece rims as hazardous, in the docket in 1979, the organization reversed

itself and in 1979 there are letters marked as Plaintiff's Appendix "I" and "J", which showed that this organization opted for the OSHA standards as opposed to the banning of multi-piece rims. This information was known to CBS at the time of the broadcast.

28. Defendant's Statement
Goodyear Tire & Rubber Co. engineers authored a report that called multi-piece rims "inherently dangerous," and a Goodyear training film emphasized the need for caution in dealing with them.

28. Plaintiff's Counterstatement
This fact is disputed. One of the subjects of the Plaintiff's efforts in discovery is to obtain the report which is mentioned in the program. The reference to the inherently dangerous product Plaintiff believes was to refer to the "K" rim which statistically proved to be more prone to explosive separation than other rim designs. However, since the Defendant has failed and refuses to turn this information over to the Plaintiff, this is a matter in dispute. In addition, the Goodyear film on the program did not refer to "all multi-piece rims." In addition, there is a need for caution when servicing single piece wheels as the same potential force is contained in a pressurized tubeless tire.

29. Defendant's Statement
From 1969 to 1974, NHTSA investigated the RH 5° rim, and it secured a commitment that its manufacturers would cease production of it.

29. Plaintiff's Counterstatement
The production of the RH 5° rim was phased out in 1973 due to obsolescence of the design. NHTSA did not secure commitment from the manufacturers of that rim. NHTSA found no defect in the design of this rim.

30. Defendant's Statement
NHTSA also investigated K-type rims and secured a commitment from Goodyear Tire & Rubber Co. that it would cease production of them.

30. Plaintiff's Counterstatement
The "K" type rim was phased out in 1972 before the NHTSA investigation was completed. Plaintiff believes that there was no defect in the design of this rim to be found by NHTSA.

31. Defendant's Statement
In 1979, NHTSA began an investigation to determine whether multi-piece rims should be banned, and in 1980 it announced that a ban was contemplated.

31. Plaintiff's Counterstatement
In 1980, NHTSA did not ask the manufacturers of "K" type and RH 5° degree rims to voluntarily recall those in use. On the contrary, an unauthorized letter was written by an employee of NHTSA.

32. Defendant's Statement
In 1980, NHTSA asked the manufacturers of K-type and RH 5° rims voluntarily to recall those in use, but the manufacturers declined.

32. Plaintiff's Counterstatement
A letter marked Plaintiff's Appendix "K" clarifies the authority of the so-called "Bradford" letter and clearly suggests that it did not constitute a request by NHTSA to voluntarily recall these rims.

33. Defendant's Statement
The CBS broadcasts in 1981 truthfully reported that NHTSA was considering a ban of multi-piece rims and that it had asked the manufacturers of some rim types to recall them but that the manufacturers had declined.

33. Plaintiff's Counterstatement
The CBS broadcast was in error in that it reported that NHTSA was considering a ban when in fact NHTSA was considering a petition filed by the Defendant, Insurance Institute for Highway Safety, requesting a ban. Also, that the NHTSA had asked the manufacturers of some type rims to recall them and that the manufacturers had declined. On the contrary, an unauthorized letter by an employee of NHTSA had been sent out and which had been denied by the industry. See Plaintiff's Appendix "K". It is also noted that in the program

"Killer Wheels" there was no specification that the request for an alleged recall involved only two types of multi-piece rims.

34. Defendant's Statement
In 1980, OSHA promulgated a safety standard for servicing multi-piece rims.

34. Plaintiff's Counterstatement
In 1980, OSHA promulgated a safety standard for servicing multi-piece rims. 45 F.R. 6706 et seq. (1-29-80), this safety standard is expected to eliminate the primary cause of multi-piece rim separations that is mishandling by tire service persons.

35. Defendant's Statement
In April 1981, NHTSA announced its intention to terminate its rulemaking proceeding for a ban on multi-piece rims.

35. Plaintiff's Counterstatement
NHTSA terminated its rule making proceedings for a ban on multi-piece rims in 1982. 47 F.R. 8232 (2-25-82).

36. Defendant's Statement
Safety legislation or regulations for multi-piece rims have been enacted in at least four states and such enactments have been considered in Pennsylvania.

36. Plaintiff's Counterstatement
Admitted. However, all of the jurisdictions have adopted OSHA type servicing regulations for multi-piece rims and after investigation none of them have found the rim to be unsafe or have declared it unsafe.

37. Defendant's Statement
Exhibit A to Redco's complaint is a correct transcript of the *60 Minutes* broadcasts at issue.

37. Plaintiff's Counterstatement
It is incorrect to admit that Exhibit A to Redco's Complaint is a correct transcript of the "60 Minutes" broadcast. This is because the broadcast included visual matters as well as the written matter. When the visual matter is considered along with the written matter, additional and persuasive untruthful and libelous material is presented. For example, the manner in which the manufacturers' "side"

is presented by editing techniques, close-ups and other visual manipulation, suggest they are untruthful in their position where the contrary is presented as the truthful "side" of the innocent victim and the public. Also, a diagram showing the explosive separation of a multi-piece rim is highly misleading for a properly seated multi-piece rim is incapable of explosive separation.

38. Defendant's Statement
In 1977, NHTSA promulgated a motor vehicle safety standard requiring rim components to be marked with information to enable proper matching.

38. Plaintiff's Counterstatement
Admitted.

39. Defendant's Statement
In 1978, Roman L. Brooks, a NHTSA staff member, prepared a report discussing the multi-piece rim problem.

39. Plaintiff's Counterstatement
Roman L. Brooks, a NHTSA staff member, prepared an internal memorandum from information obtained from an attorney representing Plaintiff in multi-piece litigation. The memorandum prepared in 1978 is not a NHTSA report and is in no way an official government report. In fact, the Defendant's counsel, either by inadvertence or by design, failed to reproduce the second page of said report noted as Exhibit F in its appendix to Memorandum in Support of Motion for Defendant, CBS, Inc., Summary Judgment. A copy of that second page is marked Plaintiff's Appendix "F" and is included therein. This Exhibit indicates that the document does not express the opinions, findings and conclusions of the

National Highway Traffic and Safety Administration. See also paragraph 21 of Plaintiff's Appendix "E".

40. Defendant's Statement
At no time did the *60 Minutes* broadcasts at issue mention Redco by name.

40. Plaintiff's Counterstatement
The "60 Minutes" segment "Killer Wheels" referred to four major manufacturers suggesting that there were other *manufacturers*. Also, the program referred to "all" the manufacturers of multi-piece rims at least *twelve* times during the program. While Redco Corporation was not mentioned by name during the program since there are only "six" manufacturers of multi-piece rims, by necessity, the general reference to the manufacturers of multi-piece rims included Redco Corporation.

41. Defendant's Statement
At no time did the *60 Minutes* broadcasts at issue mention by name any of the rim types manufactured by Redco.

41. Plaintiff's Counterstatement
While at no time did the "60 Minutes" broadcast at issue mention by name any of the rim types manufactured by Redco, the program in fact referred to multi-piece rims, in a generic sense, at least 35 times. In fact, the multi-piece rim which formed the basis of the alleged test film made by the Insurance Institute for Highway Safety, was a rim of design similar to that of the Redco rim.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Pennsylvania Bill of Rights, Article I, §7 of the Pennsylvania Constitution, provides in relevant part:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.

The Pennsylvania Shield Law, 42 Pa. C.S. § 5942, provides:

> (a) *General Rule.* — No person engaged on, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.
>
> (b) *Exception.* — The provisions of subsection (a) insofar as they relate to radio or television stations shall not apply unless the radio or television station maintains and keeps open for inspection, for a period of at least one year from the date of the actual broadcast or telecast, an exact recording, transcription, kinescopic film or certified written transcript of the actual broadcast or telecast.